United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7436

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 76-7436

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P/S

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JOELLE FISHMAN, PETER GAGYI,
GUS HALL and JARVIS TYNER

Plaintiffs-Appellants

vs.

GLORIA SCHAFFER, in her capacity as Secretary of the State of the State of Connecticut and EVELYN GOODWIN, in her capacity as Town Clerk of the Town of Litchfield, Connecticut

Defendants-Appellees

BRIEF OF THE APPELLEE GLORIA SCHAFFER

On Appeal From The United States District Court
For The District of Connecticut

For Appellee Gloria Schaffer

Carl R. Ajello
Attorney General

Barney Lapp
Assistant Attorney General

Daniel R. Schaefer
Assistant Attorney General

William N. Kleinman
Assistant Attorney General

This appeal was ordered on September 14, 1976 to be heard on an expedited basis, with briefs to be filed by Appellees by September 20, 1976, at 4:00 P.M. Although we had hoped to prepare a Table of Citations, we regret that we have been unable to do so within the available time.

We will seek to submit the Table separately as soon as possible.

I N D E X

ISSUES

Should extraordinary relief which would require either delay in printing and distribution and/or reprinting and redistribution of absentee ballots and/or a summary order that an evidently disqualified petitioning party be nevertheless placed on the ballot be granted, when to do so would disrupt the fair and orderly electoral process of a state?

Should drastic orders issue particularly when the plaintiffs failed to exercise due diligence in bringing their suit in a timely manner, to the prejudice of the public interest and the conduct of elections, in light of the emphatic holding of the United States Supreme Court in Williams v. Rhodes and Socialist Labor Party v. Rhodes, 393 U.S. 23 (1968)?

STATEMENT OF THE CASE

This is an expedited appeal. Because of the time limitations the pertinent procedural facts will be referred to in the Argument and not repeated here.

One matter, however, should be pointed out. Much is made by the plaintiffs - appellants of the claim that the defendants did not plead or introduce evidence concerninglaches or resulting prejudice. (See Appellants' Brief of September 16, 1976). The record will disclose that the defendants filed a consolidated Answer, including a defense under Rule 12(b) of the Federal Rules of Civil Procedure that "the complaint fails to state a claim upon which relief can be granted." (Answer filed July 28, 1976, First Defense, ¶ 1). Furthermore, our Brief filed in the trial court contained a section specifically headed "Laches". We stated:

> "Although the plaintiffs had since the date of the last election in which to circulate their petitions and present them to the Town Clerks, it is only now that they have decided to file a law suit. Because of the potentially disruptive effect that their prayers for relief could have, it is inequitable that they have waited this long before questioning the statutory procedures."
>
> Memorandum dated August 2, 1976, p. 18.

We then went on to discuss Socialist Labor Party v. Rhodes and other cases on this point.

Finally, we detailed in oral argument the administrative hardship of changing the petition certification procedure at this late date for this year's elections. We also submitted a subsequent Affidavit indicating the hundreds of pages involved for the George Wallace Party, alone, in 1974.

* * * * * * * * * * * * * * * * * *

The constraints of time also do not permit us to produce a consolidated appendix. Accordingly, we respectfully refer the Court to the Affidavits previously filed in the District Court as well as in this Court. We are also submitting several additional Affidavits with this Brief in the form of an Addendum. We do so because these involve facts arising since the date of the judgment of the lower Court and in some cases since our argument before this Court on September 14, 1976. These Affidavits have a bearing on possible mootness of this case due to the present petition status of the Communist Party. They

also include other related matters. These are submitted at this time upon the authority of Epperson v. Arkansas, 393 U.S. 110 (1968), concurring opinion of Mr. Justice Black, Id. at 110; Cash v. Murphy, 339 F.2d 757 (5th Cir. 1964, n.2 at 758. We believe that this information may be of assistance to the Court in the resolution of this case.

ARGUMENT

The Secretary of the State of the State of Connecticut urges this Court that the relief sought in this appeal would have a chaotic and disruptive effect upon this year's electoral process for Connecticut. We shall first discuss the issue of laches as of the date of the District Court's decision. We will then examine how this problem has since been compounded. We will then turn to some jurisdictional considerations.

A. EQUITABLE CONSIDERATIONS AS OF THE DATE OF THE DISTRICT COURT'S DECISION.

The three-judge District Court found it unnecessary to rule on the merits because the plaintiffs were barred by the equitable principle of laches. The Court stated:

> "The plaintiffs have had since the election in November of 1974 to bring this suit. The particular reason that led the plaintiffs to bring this action is not one which just cropped up. Indeed, they failed in their effort to qualify for a position on the ballot in that prior election. No explanation was offered to indicate why they did not bring this case earlier, during a time when the state legislature, the body which ultimately must choose which constitutional method should be employed, was in session."

> "...[O]ur striking down the present method at this time would not provide for a less burdensome one but would leave the State with no protection at all. We are not disposed to exercise our equitable powers in a way 'which may be prejudicial to the public's interest.' United States ex rel. Greathouse v. Dern, 289 U.S. 352, 360 (1933). By affording the legislature a reasonable opportunity to devise a significantly less burdensome method, we heed the Supreme Court's admonition in Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943), that 'a sound respect for the independence of state action requires the federal court to stay its hand.'..."

The Court held that,

> "...[B]ecause the unexplained and unjustifiable delay on the part of the plaintiffs in initiating this action has created a situation which makes it impossible for this court to afford relief and at the same time safeguard the legitimate interests of the State of Connecticut, our discretion should be exercised to deny equitable relief in the nature of either an injunction or a declaratory judgment...."
>
> Memorandum of Decision, pp. 14 and 15.

It is important to note that the District Court's finding in this respect is fully supported by the case law which we still maintain would make the present appeal bordering on the frivolous. In Socialist Labor Party v. Rhodes, 393 U.S. 23 (1968), a companion case to Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court denied relief to the Socialist

Labor Party on the following grounds:

> "...At that hearing Ohio represented to Mr. Justice Stewart that the Independent Party's name could be placed on the ballot without disrupting the state election, but if there was a long delay, the situation would be different. It was not until several days after that hearing was concluded and after Mr. Justice Stewart had issued his order staying the judgment against the Independent Party that the Socialist Labor Party asked for similar relief. The State objected on the ground that at that time it was impossible to grant the relief to the Socialist Labor Party without disrupting the process of its elections; accordingly, Mr. Justice Stewart denied it relief, and the State now repeats its statement that relief cannot be granted without serious disruption of election process. Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters...." (Emphasis added.)
>
> 393 U.S. at 34-35.

It is noted that this decision was followed in Sullivan v. Grasso, 292 F.Supp. 411 (D.Conn. 1968), a case involving a challenge to the Connecticut write-in vote procedures. Judge Smith in dismissing the Complaint noted that the action came "at the eleventh hour, after failure to take advantage

of the petition procedures,..." 292 F.Supp. at 413.

It is noted that Judge Clarie observed in his Ruling denying a motion for preliminary injunction in another elections case:

> "...The four and one-half months which have elapsed between the approval and filing of the amended party rules and the filing of this action may support the equitable defense of laches, cf. Gillespie & Co. v. Weyerhaeuser Co., slip op. at 2871 (2d Cir. April 1, 1976...."
>
> Armstrong, et al v. Schaffer, et als, Ruling On Motion For Preliminary Injunction, Civ. No. H 76-136, D.Conn., May 3, 1976.

Turning to the facts in this case, the issue of laches, as even the plaintiffs - appellants must recognize (See their Brief In Support Of Injunction Pending Appeal, Sept. 2, 1976, page 7, quoting the Southern Pacific Railway Company case) involves lack of due dilligence and resulting prejudice by the delay. The plaintiffs - appellants obtained the petition forms on February 20, 1976. (Our Affidavit of September 9, 1976, ¶ 13; Our Affidavit of August 2, 1976. filed in Dist. Ct., ¶ 3.) The forms indicated the existence of the certification requirement now challenged. In addition, instructions outlining the certification requirement

and containing copies of the statutes now attacked were also provided that date. (Our Affidavit of September 9, 1976, ¶ 13.) Furthermore, the consent of the candidacy for Gus Hall, the Communist Party presidential candidate, was signed as early as January 21, 1976, prior to the alleged date of his nomination on February 18, 1976. (See consent form attached to our Affidavit of August 2, 1976.) Petition forms could have been obtained as early as November 6, 1975. (Our Affidavit of August 2, 1976, ¶ 4.)

In addition, the Communist Party had unsuccessfully sought to qualify as a petitioning party in 1972, and thus the party organizers were certainly on notice as to the petition nominating procedure in Connecticut which is the same now as it was then. It should require little, if any, citation of authority for the proposition that the Communist Party itself could have instituted suit prior to the alleged date of its actual nominations. It is further noted that plaintiff Fishman qualified as a petitioning party candidate for Congress in 1974, under the same circulation and certification requirements. (Our Affidavit of September 9, 1976, ¶¶ 11 and 12.) Suffice it to say

that the requirements of the present statutes did not come to the plaintiffs as a bolt from the blue. The plaintiffs now claim that they had waited until June of 1976 before thinking about suit because they had first hoped to obtain all the necessary signatures from the larger cities in Connecticut. First, it is noted that when specifically asked for the reasons for the delay by both Judge Blumenfeld and Judge Newman in the Court below, they did not offer this as an excuse. Furthermore, they did not provide any affidavit or other written claim to this effect prior to the issuance of the Memorandum of Decision of the lower Court. It was only in their motion for a new trial that this representation was first made. More importantly, the plaintiffs had undergone the same petitioning procedure in 1972 and were unsuccessful. They were certainly on notice as to the difficulties which allegedly faced them this year. Their failure to seek relief in a timely manner can only be attributed to lack of due diligence, to say the very least. In effect, what we are now being told is that the plaintiffs decided to take a chance and gamble that the necessary signatures could be obtained under existing procedures. It was a gamble that evidently failed. It was unconscionable for

the plaintiffs to expect that the courts would then undertake a drastic revision of the Connecticut election laws under the pressures of a last minute law suit, particularly in light of the United States Supreme Court's admonition in Socialist Labor Party v. Rhodes, supra.

Thus far we have discussed the extraordinary lack of due diligence on the part of the plaintiffs, particularly in light of the Socialist Labor Party case. We now turn to the second element involved in laches, resulting prejudice and injury. The essential interest of the State, with which we are concerned, was the requirement that petitioning parties demonstrate a minimum level of support before being placed on the general ballot. More specifically, there was also an important interest in ensuring that this support be shown in an honest manner, free from fraud. As the Supreme Court has noted:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot--the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."
>
> Jenness v. Fortson, 403 U.S. 431, 442 (1971).

Let us take a closer look at this concern which the plaintiffs claim is "hard to see." (Appellants' Brief In Support Of Injunction, September 2, 1976). The Legislature had properly concluded that circulators of petitions should personally certify these documents before a disinterested public official familiar with election laws, such as the Town Clerk. A number of abuses had been found under the previous looser procedures. These were referred to in general terms before the House of Representatives by the Chairman of the Elections Committee reporting the Bill to the floor:

> "On the second part of this bill we are dealing with procedurial[sic] aspects of the nominating tradition. There are three basic changes that we are making - one, we are imposing a responsibility on the circulator; two, we are requiring that the petition form be supplied by the Secretary of State, submitted to the Town Clerk, who is[sic] turn forwards it to the Secretary of State as to certification; and three, that the names on any one page of a petition must be from one town only.
>
> "Now, as to one - the Elections Committee had presented to them abuses under this law and the primary law, and I might say that in the primary law that we will be making these changes as well as far as circulators are concerned.

> "They had abuses where eight and nine year old children were filing petitions, and getting names from the electors of the state[sic] of Connecticut.
>
> "The change that we propose will require the circulator to be an elector of the state; sign a statement on each page under penalty of perjury that the signers signed in his presence and identified himself or was known to the circulator.
>
> "As to the second change, in some instances petitions were cut out of the paper and used for signatures. This actually was unfair to the person desirous of getting on the ballot because in many instances the names, by the time they got to the Secretary of State's office were not identifiable, and in many instances they could not be counted. The change that we propose will protect the candidate as well as the people of the state[sic] of Connecticut. It will aid the town clerks and the Secretary of State's office in their duties to determine validity of names."
>
> Connecticut General Assembly 1957. House Proceedings Volume 7, Part 4, pp. 2313-2314. (Emphasis added.)

These matters had been dealt with in greater detail at hearings conducted by the Elections Committee. The Elections Division attorney in the office of the Secretary of the State reported that a number of irregularities in the filing of petitions had been discussed at various meetings with the Town Clerks and Registrars of Voters.

> "...It is apparent that one of the great difficulties encountered with the filing of petitions is the opportunity for abuse under the present system, where the petition page is left with the town clerk, certified, picked up by a third person, and then filed in our office. That provides an opportunity to people who willfully or ignorantly want to make changes to do so. For example, a petition page will provide certain number of spaces for the signatures of the petitioners. Many times the pages are not completely filled. When the page is taken out of the town clerk's office, held, and then filed with the Secretary of State, it is possible for someone else to add names to it. It's also possible to alter the certification that was made by the town clerk...."
>
> Joint Standard Committee Hearings, Connecticut General Assembly 1957, p. 111.
>
> (Emphasis added.)

It was apparent to the Court below that an effective and administratively feasible substitute remedy to effectuate this interest could not be devised in time for this year's elections due to "the unexplained and unjustifiable delay" on the plaintiffs' part. The statutory deadline for submission of nominating petitions to the Town Clerks was on August 30, 1976 pursuant to Section 9-453i, Conn. Gen. Stat. The Complaint, however, was not filed in the District Court until July 2, 1976. The hearing before the three-judge

District Court was held on an expedited basis on August 4, 1976. The Decision was filed on August 19, 1976. It was clear that the certification of petitions involves hundreds, if not thousands, of pages. (Our Affidavit of August 2, 1976, ¶ 3; our Affidavit of August 9, 1976 filed in Dist. Ct., ¶¶ 3, 4, 5 and 6.)

It is noted that the proposals of the plaintiffs - appellants contained in their Brief In Support Of Injunction, Sept. 2, 1976, p. 10, for delivery of the petitions to the Town Clerks would evidently dispense with the requirement for personal certification. The public would then be exposed to the problem of alterations, subsequent to the notarization but before delivery, which was specifically why the present provision was enacted. The other proposal of the plaintiffs - appellants for delivery of the petitions to the Secretary of the State who would then assume the duty of distribution would impose severe administrative burdens on that office. Contrary to the representations contained in the Brief of the plaintiffs - appellants (p. 10), the State never conceded that its interests would be "completely protected" by this scheme. We stated that this would require the Secretary of the State's Office to take certifications for hundreds of, if not thousands,

petition pages. (Our Affidavit of August 9, 1976, ¶ 3.) We referred to the prior qualification of the George Wallace Party as an example in which 1,730 pages were submitted by that party, alone.

It is noted that there were at least three (3) other state wide petitioning parties at the time of the District Court's decision. In the event that the District Court had issued an injunction, these other parties might have also demanded the same relief on the basis of stare decisis and thus the severe administrative burdens outlined could have been multiplied.

We also outlined in our Memorandum of August 9, 1976 the proposition that valid administrative considerations on the part of governmental bodies could be considered by the Court in election cases. One of the leading decisions on this point is Marston v. Lewis, 410 U.S. 679 (1973). The Court upheld a 50-day durational residency requirement of the State of Arizona for non-presidential elections. This was notwithstanding the Court's prior ruling in respect to 30 days in the case of Dunn v. Blumstein, 405 U.S. 330 (1972). The Court stated:

"[The 50-day requirement] reflects a state l[illegible]tive judgment that the period is ..ece ry to achieve the State's legitimate goa s.

"We accept that judgment, particularly in light of the realities of Arizona's registration and voting procedures....According to appellants' testimony, although these volunteers make registration convenient for voters, they average 1.13 mistakes per voter registration and the county recorder must correct those mistakes before certifying to the 'completeness and correctness' of each precinct register....

"An additional complicating factor in Arizona registration procedures is the State's fall primar system. The uncontradicted testimony demonstrates that in the weeks preceding the deadline for registration in general elections--a period marked by a curve toward the 'peak' in terms of the registration affidavits received--county recorders and their staffs are unable to process the incoming affidavits because of their work in the fall primaries. It is only after the primaries are over that the officials can return to the accumulated backlog of registration affidavits and undertake to process them in accordance with applicable statutory requirements.

"On the basis of the evidence before the District Court, it is clear that the State has demonstrated that the 50-day voter registration cutoff (for election of state and local officials) is necessary to permit preparation of accurate voter lists. We said in Dunn v. Blumstein that '[f]ixing a constitutionally acceptable period is purely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud--and a year,

> or three months, too much.' 405 U.S., at 348, 92 S.Ct. at 1006. In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that that determination and others like it may not stand."
>
> 410 U.S. at 681-682.

This decision was followed in Burns v. Fortson, 410 U.S. 686 (1973). The Court upheld a similar 50-day prior registration requirement contained in the Georgia Election Code, stating:

> "The State offered extensive evidence to establish 'the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws.' Plaintiffs introduced no evidence. On the basis of the record before it, the District Court concluded that the State had demonstrated 'that the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud.' (Footnote omitted.) Although the 50-day registration period approaches the outer constitutional limits in this area, we affirm the judgment of the District Court. What was said today in Marston v. Lewis, 410 U.S. 679, at 681, 93 S.Ct. 1211, at 1213, 35 L.Ed.2d 627, is applicable here."
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> Id. at 687-688.
>
> See also: American Party of Texas v. White, 415 U.S. 767 (1974), N. 18 at 788.

It is noted that we also detailed many of these matters during oral argument in the Court below.

Of course, we are talking about laches as of the date of the District Court's decision. We are submitting the additional affidavits of the Town Clerk and Registrar for the City of Hartford. They indicate the number of hours involved in just receiving, certifying and providing receipts for petitions submitted in Hartford alone by petitioning parties as the deadline drew near.[1] If the Secretary of the State was to have assumed this burden for receiving petitions for all the 169 towns in the State of Connecticut and for all petitioning parties, it is obvious that this burden would have been magnified many times. It may be that in the future, with sufficient funds and time to gear up administratively,--and with reconsideration by the Legislature of related election statutes-- the Secretary of the State's office might be able to assume this responsibility. However, the deadline for submission of petitions to that office might have to be advanced by as much as a week to allow for the additional time required for the Secretary to forward the petitions to the Town Clerks for verification.

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[1] See Addendum to this Brief.

It is noted that we also detailed many of these matters during oral argument in the Court below.

Of course, we are talking about laches as of the date of the District Court's decision. We are submitting the additional affidavits of the Town Clerk and Registrar for the City of Hartford. They indicate the number of hours involved in just receiving, certifying and providing receipts for petitions submitted in Hartford by the Communist Party as the deadline drew near. If the Secretary of the State was to have assumed this burden for receiving petitions for all the 169 towns in the State of Connecticut and for all petitioning parties, it is obvious that this burden would have been magnified many times. It may be that in the future, with sufficient funds and time to gear up administratively,--and with re-consideration by the Legislature of related election statutes--the Secretary of the State's office might be able to assume this responsibility. However, the deadline for submission of petitions to that office might have to be advanced by as much as a week to allow for the additional time required for the Secretary to forward the petitions to the Town Clerks for verification.

It is also noted that Judge Newman in oral argument had asked whether there might be still another alternative. Could the petitions be presented to the Town Clerk for the town in which the circulator was an elector, with that Town Clerk then having the duty of forwarding the petitions to all the other Town Clerks involved? This is a proposal which the Legislature may also wish to analyze.

It would certainly be necessary, at any rate, for any change to be thought out in advance, and not imposed summarily and in haste in disregard of the realities. The District Court was more than justified in concluding that it was too late as a practical matter to afford relief and still protect the legitimate interests of the State of Connecticut in efficient administration and prevention of fraud.

The District Court cited Burford v. Sun Oil Co., 319 U.S. 315 (1943) wherein the Court stated in a case involving a complicated regulatory system devised for the conservation of petroleum products:

> "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise,

> 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'..."

Id. at 317-318 (Black, J.).

Furthermore, it is noted that the United States Supreme Court in reversing a Connecticut District Court's intervention in the area of reapportionment stated in Gaffney v. Cummings, 412 U.S. 749 (1973):

> "Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' Burns v. Richardson, 384 U.S., at 92, 86 S.Ct., at 1297, is primarily a political and legislative process. Reynolds v. Sims, 377 U.S., at 586, 84 S.Ct., at 1362. We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.

> "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.
>
> "This very case represents what should not happen in the federal courts....Was the Master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard.
>
> "The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved...."
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> Id. at 750-752.

The Court was, therefore, justified in giving the Legislature an opportunity to work out a solution to the present problem.

B. FURTHER EQUITABLE CONSIDERATIONS AS OF NOW.

The administrative difficulties which would have resulted had the District Court issued an injunction are, of course, further exascerbated by subsequent events. This, in fact, is even recognized by the plaintiffs - appellants in their Reply Brief of September 2, 1976. By the time the present brief is scheduled to be filed, September 20, 1976, the presidential and overseas absentee ballots will have already been printed and distributed. We stated in our earlier brief in this Court that all the other absentee ballots had to be in the hands of the printer no later than September 22, 1976. We are now informed by the printer who prints the great majority of the absentee ballots for the towns that he would prefer to have the ballot forms by September 17, 1976 but would have to have them by September 20, 1976, in order to meet the statutory deadline imposed on Town Clerks for distribution to the absentee voters. These matters are set forth at length in our Affidavit of September 9, 1976 filed in this Court with our earlier brief.[2]

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[2] As to the specific time involved for validating signatures, as distinguished from receiving petitions, see Affidavit of the Supervisor of the Records Room of the Hartford Registrar of Voters, Addendum to this Brief.

If the plaintiffs - appellants were to be placed on the ballot, the absentee ballots would have to be reprinted and redistributed. Where the original ballot had already been mailed out to absentee voters, another set would have to be sent. This raises the specter of multiple ballots being received by a voter and then being cast by him or her, at least in many cases.

It is noted that in the 1972 presidential election approximately 99,000 absentee ballots were submitted to the town registrars and of these 97,000 were counted as being validly cast. There were approximately 1.4 million votes cast in total for that year. There are a number of occasions, of course, where the absentee vote can make the difference in a close election. This is but an illustration of the severe difficulties and impracticalities involved in the contentions of the plaintiffs - appellants. It is noted that they have suggested that the absentee ballots could be printed with the names of their candidates and "absentee ballots marked for a subsequently disqualified candidate could be counted as write-ins." (Appellants' Reply Brief of September 2, 1976, p. 9.) This, if anything, would only increase confusion since it would appear to the

absentee voter that the Communist Party had earned a place on the ballot when, in fact, this was only a stop-gap measure. It is but another example of the simplistic "solutions" that come forth at the last minute.

If the Secretary of the State were to be required to accept nominating petitions at any time after August 30, 1976, there would be a further problem wholly apart from administrative hardship. There would be nothing to prevent the petitioning party from obtaining signatures in the interim, after the August 30, 1976 deadline but before the filing date. This would certainly put all other petitioning parties at a disadvantage.

Furthermore, there are statutory penalties for a false certification to a Town Clerk. What statutory criminal sanctions would there be for false certification to the Secretary of the State based upon a procedure implemented on an interim basis?

Plaintiffs cite Williams v. Rhodes, 393 U.S. 23 (1968) as a case "which is on all fours and will require reversal." (Appellants' Reply Brief of September 2, 1976, p. 7.) In Williams, the District Court did dismiss the complaints in part based upon laches. However, the Court was concerned

with the difficulty of interpreting the Ohio election laws at a late date, not the administrative problem of finding a new remedy and then implementing it.

> "...We are asked to go through the Ohio Election laws, declaring such as we deem inappropriate to plaintiffs' purposes to be unconstitutional and in any event to award them ballot position irrespective of the remaining election laws."
>
> Socialist Labor Party v. Rhodes, 290 F.Supp. 983 (D. Ohio 1968) at 990.

An injunction pending appeal was then issued by Mr. Justice Stewart which would have placed the American Independent Party (George Wallace's) on the ballot. On the facts of that case it was found that there would be no disruption of the state election as a result. Some time afterwards, the Socialist Labor Party sought the same relief and the state then objected on the basis that it would interfere with the printing and distribution of the absentee ballots and disrupt the electoral process. Accordingly, the motion was denied. See Williams v. Rhodes, 89 S.Ct. 1 (Sept. 10, 1968; Socialist Labor Party v. Rhodes, 89 S.Ct. 3 (Sept. 16, 1968). See also the analysis of Justice Stewart's action (in which he had consulted most of the other members of the Court beforehand) by the full court in the decision on the appeal itself. Williams v. Rhodes and Socialist Labor Party

v. Rhodes, 393 U.S. 23 at 34-35 quoted in this Brief, supra, pp.

Finally, as of Friday, September 17, 1976 the Communist Party has less than 12,000 valid signatures according to the records of the Secretary of the State's office.[3] Even assuming that all the remaining 1,550 or so names which the plaintiffs say have not yet been filed are completely legitimate, they still will evidently fall short of the required 14,093 signatures required to be on the ballot. We will update this information for the Court's hearing in this appeal.

This, of course, brings us to the next distinction between the present case and Williams. In the latter, there was no question but that the American Independent Party had obtained the necessary signatures. In our case, however, there is a very real issue as to the sufficiency of the signatures and the procedures and time involved for verifying them.

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[3] See additional Affidavit of Secretary of the State Elections Attorney, Addendum to this Brief.

C. JURISDICTIONAL AND OTHER CONSIDERATIONS.

There remains to be considered what action is within the jurisdictional authority of this Court to take. The plaintiffs state in their Reply Brief of September 2, 1976 that the District Court ruled that they "would be entitled to injunctive relief but were barred by the equitable defense of laches." (p.5.) Actually, notwithstanding strong dicta, what the Court held was this:

> "We do not, however, find it necessary to rule on the merits of this action, since we find the plaintiffs barred by equitable doctrine of laches."
>
> Memorandum of Decision, p. 14.

Indeed, if the Court had ruled on the merits, the Court of Appeals evidently would have no jurisdiction whatsoever.

It is noted that the Supreme Court in Gonzalez v. Automatic Employees Credit Union, 95 S.Ct. 289 at 295 (1974), stated:

> "Mercantile argues that § 1253 should be read to limit our direct review of three-judge court orders denying injunctions to those that rest upon resolution of the constitutional merits of the case. There would be evident virtues to this rule...."

However, the Court found that it was unnecessary to go this far, stating that the dismissal by the lower court on the basis of standing took the case out of the Supreme Court's jurisdiction under § 1253.

Subsequently, however, the Court in MTM, Inc. v. Baxley, 95 S.Ct. 1278 (1975) adopted this narrow construction of § 1253 in toto, holding:

> "In light of these factors, we conclude that a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below."
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> Id. at p. 1281.
>
> See also Butler v. Dexter, 96 S.Ct. 1527 (April 19, 1976) per curiam.

The point is that the most that we respectfully submit this Court can do in the event there is a reversal on the grounds of laches is to remand the case to the District Court for further proceedings, not inconsistent with the opinion of the Court of Appeals. The District Court would then have to rule definitively on the merits with a subsequent right of appeal to the United States Supreme Court, assuming other jurisdictional prerequisites were met. We feel obliged to

point this out because, from the standpoint of subject matter jurisdiction, the only forum which could hear appeals on the merits would be the United States Supreme Court and not the Court of Appeals, pursuant to § 1253 as interpreted. If this results in unnecessary delay, we can only submit that it is the result of the difficult appellate procedure involved under Section 28 U.S.C., § 1253, alluded to in both the majority and dissenting opinions in Thoms v. Heffernan, 473 F.2d 478, 480 at n.1, 481, 487-488 (2d Cir. 1973), vacated on other grounds, 418 U.S. 908 (1974); see Abele v. Markle, Docket No. MR-5241 (2d Cir. filed May 9, 1972), involving the Connecticut abortion case, cited at 473 F.2d 478, supra.

For the record, it should be pointed out that the District Court found that with the possible exception of the petition certification procedures, there is no question but that the Connecticut statutory scheme was fair, equitable and constitutional.

> "A brief description of what Connecticut requires in order to demonstrate that 'significant modicum of support' will serve to place the plaintiffs' claim into sharper focus. Connecticut has one of the least demanding schemes for enabling potential candidates to gain a place on the ballot."
>
> Memorandum of Decision, pp. 2-3.

> "That both the numerosity requirements and the time in which to satisfy them are markedly more favorable to the potential candidate in Connecticut than are constitutionally required, readily appears in light of recent Supreme Court decisions. Measured against the pattern of the foregoing decisions, we do not hesitate to say that for the purpose of demonstrating that a would-be candidate has 'a significant measurable quantum of community support,' American Party of Texas v. White, 415 U.S. 767, 782 & n.14, Connecticut's election laws impose no constitutionally impermissible burden on the plaintiffs in those respects.
>
> "Having matched those two substantive elements in Connecticut's access-to-the-ballot scheme against similar ones in Georgia, Texas and California which the Supreme Court has upheld as constitutionally permissible, we find Connecticut's to be substantially less restrictive...."
>
> Memorandum of Decision, pp. 3-6.

Notwithstanding this, the appellants now demand that the Court of Appeals issue "an injunction requiring that Hall and Tyner be placed on the ballot." (Appellants' Brief, September 16, 1976, p. 8). They cite Mitchell v. Donovan, 290 F.Supp. 643 (D.Min. 1968) and Communist Party of Illinois v. Ogilvie, 357 F.Supp. 105 (N.D. Ill. 1972). These cases are clearly distinguishable. First, the injunctions in both cases were issued by 3-judge District Courts in the exercise of the original jurisdiction, and not by any Courts of Appeal in

reviewing these decisions. Secondly, in Mitchell the only reason why the state had refused to accept the tendered nominating petitions was the Communist Control Act of 1954, 50 U.S.C.A., §§ 841 and 842. The law restricted the activity of the Communist Party. There was no issue as to the sufficiency of the petitions or the procedures for verifying them. Similarly, in the Communist Party of Illinois case one of the issues involved a loyalty oath. There was also a requirement that no more than 13,000 petition signatures from any one county be credited toward the total of 25,000 signatures required. The District Court held that the petition statutes as a whole were unconstitutional. The Court relied upon Moore v. Ogilvie, 394 U.S. 814 (1969) in which the United States Supreme Court had held that a broader county-wide signature requirement in the same state was unconstitutional. Again, there was no question as to the sufficiency of the signatures or the methods and time involved in validating them.

* * * * * * * * * * * * * *

Thus far we have discussed principally subject matter jurisdiction and related issues. Wholly apart from this, however, the extreme relief which is now demanded should be denied for other reasons, also. States are given broad discretion in formulating election policies, subject, of course, to constitutional requirements. The Allegations concerning voting or associational rights do not automatically trigger the compelling state interest, strict scrutiny test. These principles were well summarized in a recent three-judge District Court decision in Connecticut, Nader, et al v. Schaffer, et al, ____F.Supp.____ (No. H 76-20, July 14, 1976). Although an appeal is pending from this case, there can be no question as to the basic propositions and Supreme Court decisions summarized there as follows:

> "...The legislatures of '[t]he states have broad discretion in formulating election policies.' Tansley v. Grasso, 315 F.Supp. 513, 519 (D. Conn. 1970) (three-judge court), citing Williams v. Rhodes, 393 U.S. 23, 34 (1968); United States v. Classic, 313 U.S. 299, 311 (1941); and Voorhes v. Dempsey, 231 F.Supp. 975, 977 (D. Conn. 1964)

(three-judge court) (per curiam), aff'd mem., 379 U.S. 648 (1965). Accord, Bullock v. Carter, supra, 405 U.S. at 141; see also Storer v. Brown, supra, 415 U.S. at 729-30 and 736."

Id. at 23.

"'Not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review.' Bullock v. Carter, 405 U.S. 134, 143 (1972), citing McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). Similarly, a state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a 'compelling interest' justification. See, e.g., Connecticut State Federation of Teachers v. Board of Education Members, ___ F.2d ___ (No. 75-7436, 2 Cir., May 21, 1976), and authorities cited therein. In Storer v. Brown, supra, 415 U.S. at 729, the Supreme Court stated:

> "'[A]ppellants . . . assert that under [certain Court decisions], substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest . . . . It has never been suggested that [the rule of these decisions] automatically invalidates every substantial restriction on the right to vote or to associate.' (Emphasis supplied.)"

> "There must be more than a minimal infringement on the rights to vote and of association, therefore, before strict judicial review is warranted. See Buckley v. Valeo, supra, and United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 567 (1973) ('neither the right to associate nor the right to participate in political activities is absolute'); Kusper v. Pontikes, 414 U.S. 51, 58 (1973) ('a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest') (emphasis added)."
>
> (Emphasis in the quotation from Bullock v. Carter, preceding page, added.)
>
> Memorandum of Decision, pp. 20, 21.

One of the leading cases involving petition requirements is American Party of Texas v. White, 415 U.S. 775 (1974). In that case new parties had to obtain support by qualified voters equal to at least 1% of the total votes cast for Governor at the last previous general election. This requirement was to be met in two ways. First, the party was to hold a convention and submit a list of the participants signed and certified by the convention chairman. If the number of these participants were insufficient to meet the 1% test, the supplemental petitions

had to be obtained within fifty-five days. Each signature had to be notarized. The Court in sustaining these requirements stated:

> "The District Court recognized that any fixed percentage requirement is necessarily arbitrary, but we agree with it that the required measure of support--1% of the vote for governor at the last general election and in this instance 22,000 signatures--falls within the outer boundaries of support the State may require before according political parties ballot position. To demonstrate this degree of support does not appear either impossible or impractical, and we are unwilling to assume that the requirement imposes a substantially greater hardship on minority party access to the ballot. Two political parties which were plaintiffs in this very litigation qualified for the ballot under Art. 13.45(2) (Supp. 1973) in the 1972 election. It is not therefore, immediately obvious that the Article on its face or as it operates in practice, imposes insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed."
>
> Id. at 783-785.

It is significant that the Court also recognized that the petitioning parties might require a substantial number of circulators in order to comply with the statute. This, however, did not invalidate the system.

> "Neither do we consider that the 55 days is an unduly short time for circulating supplemental petitions. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers--only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. A petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible. Dunn v. Blumstein, 405 U.S. 330, 360, 92 S.Ct. 995, 1012 (1972). Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those imposed by Texas are too onerous, especially where two of the original party plaintiffs themselves satisfied those requirements.
>
> Id. at 787-788.

It is noted that the Court also upheld the requirement that each signature be notarized.

It is significant that both in the Williams and American Party of Texas cases the Court looked to the actual experience under these statutes, finding that in the former case no party had ever qualified while in the latter they had. In this respect it should be emphasized that in Connecticut within the last ten (10) years four (4) petitioning

parties have qualified on a state wide basis under the same procedures now attacked. As indicated in our Affidavit of August 2, 1976, these parties are as follows:

Year	Party(s)	Offices
1966	None	None
1968	George Wallace Party	Presidential Electors
1970	Dodd Independent Party	U. S. Senate
1972	None	None
1974	George Wallace Party	U. S. Senate Governor Lt. Governor Secretary of State Treasurer Comptroller
	American Party	U. S. Senate Governor Lt. Governor Secretary of State Comptroller

To this list there should be one addition. As of the date of writing this brief we are informed by the office of the Secretary of the State, Elections Division, that the U. S. Labor Party, on an unofficial basis, will also qualify for the office of Presidential Electors for this year. That party evidently now has over 15,000 signatures, including petitions on file with the Secretary's office as

well as numbers telephoned in from Town Clerks.[4] Once the petitions are actually received from the Town Clerks and tallied by the Secretary, the qualification will become official. The U. S. Labor Party will be on the absentee ballots and in all probability on the voting machine ballots.

CONCLUSION

From the standpoint of subject matter jurisdiction and substantive law, the drastic orders demanded of this Court should be denied, it is respectfully submitted. We further urge the Court that the "relief" proposed by the appellants would have a disruptive effect upon this year's electoral process in the State of Connecticut. There would be voter confusion and administrative hardship. Absentee, overseas and presidential ballots would have to be reprinted and redistributed, contrary to existing law. The election could be clouded due to the probability of the casting of multiple ballots. If the printing of the absentee ballots were somehow delayed even at this late date, it is probable that many persons would not receive

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[4] See additional Affidavit of Secretary of the State Elections Attorney, Addendum to this Brief.

them in time to cast their vote for this year's election. The fair and orderly functioning of the electoral process would be impaired.

It is therefore respectfully submitted that the judgment of the District Court be affirmed.

Dated at Hartford, Connecticut this 17th day of September, 1976.

Respectfully submitted,

DEFENDANT - APPELLEE,
GLORIA SCHAFFER, in her
Official Capacity as
Secretary of State of
the State of Connecticut

BY: CARL R. AJELLO
ATTORNEY GENERAL

Barney Lapp
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Daniel R. Schaefer
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

William N. Kleinman
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Her Attorneys

(Telephone:
Area 203
566-2203)

ADDENDUM

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOELLE FISHMAN, ET ALS	:	
Plaintiffs - Appellants	:	DOCKET NO. 76-7436
vs.	:	
GLORIA SCHAFFER, in her Official Capacity as Secretary of State of the State of Connecticut, ET AL	:	AFFIDAVIT IN SUPPORT OF THE BRIEF OF THE DEFENDANT-APPELLEE GLORIA SCHAFFER
Defendants - Appellees	:	

STATE OF CONNECTICUT)
) ss. Hartford SEPTEMBER 17, 1976
COUNTY OF HARTFORD)

I, ROBERT J. GALLIVAN, being first duly sworn, depose and say:

1. I am the town and city clerk of the City of Hartford, Connecticut. I have held this position for seventeen (17) years. Prior thereto I served as assistant clerk for ten (10) years. I have personal knowledge of the matters hereinafter referred to, and make this Affidavit in support of the brief of the defendant-appellee Gloria Schaffer.

2. During the month of August 1976, the office of the city clerk of Hartford spent a substantial amount of time and effort in certifying the signatures of circulators of nominating petition signature pages as required by section 9-453 of the Connecticut General Statutes.

3. As the August 30th deadline for filing these pages approached, an even greater amount of time spent by my office was devoted to the certification of these pages. As part of the process of receiving these pages, both the number of signatures as well as the number of pages must be counted in order that this office as well as the circulator will have a record of them before the petition pages are forwarded to the registrar's office for verification of the signatures.

4. During the approximately three days before the August 30th deadline, I, and my two assistants, spent an average of one-third to one-half of our days, each day, working on the petition certification alone, to the exclusion of the normally burdensome work of this office.

5. It should be emphasized that the above-described procedure deals only with the initial receipt and certifi-

cation process, and not the verification of the signatures themselves, which, in Hartford, is performed by the Registrar of Voters.

Robert J. Gallivan

Robert J. Gallivan
Town and City Clerk
City of Hartford, Connecticut

Sworn to before me this 17th
day of September, 1976.

William N. Kleinman

William N. Kleinman
Commissioner of the Superior Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOELLE FISHMAN, ET ALS	:	
Plaintiffs - Appellants	:	DOCKET NO. 76-7436
vs.	:	
GLORIA SCHAFFER, in her Official Capacity as Secretary of State of the State of Connecticut, ET AL	:	AFFIDAVIT IN SUPPORT OF THE BRIEF OF THE DEFENDANT-APPELLEE GLORIA SCHAFFER
Defendants - Appellees	:	

STATE OF CONNECTICUT)
) ss. Hartford SEPTEMBER 17, 1976
COUNTY OF HARTFORD)

I, DOROTHY DLUBAC, being first duly sworn, depose and say:

1. I am the Supervisor of the Record Room of the Registrar of Voters Office for the City of Hartford. I have held this position for sixteen (16) years. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of the brief of the defendant-appellee Gloria Schaffer.

2. This office is responsible for certifying the signatures found on nominating petition signature pages

which are forwarded to us by the office of the city clerk.

3. The verification requirement is basically as follows: First, voter lists are checked to see if the names and addresses that appear on the petitions correspond to those on the lists. If they do, a notation is made to prevent multiple verifications. If a corresponding name and address cannot be found on that list, the lists of new voters are then consulted. If that reference fails, the bound Registry List is consulted which reflects changes in address. At this point, failure to find a corresponding name and address results in the rejection of the signature. It is the policy of this office to then make a written notation as to the reason for rejection in the event that the rejection is questioned at a future date.

4. Using this procedure, it takes our office approximately three days of intermittent working to complete the verification of twenty-five (25) nominating petition signature pages.

5. For the week after August 30, 1976 virtually the only work done in this office other than the actual registration of voters dealt with the verification of signatures of these nominating petition signature pages.

6. In addition to the time spent that week during normal office hours, five (5) women worked a total of twenty-six and one-half (26 1/2) overtime hours, much of which was spent in this verification process.

Dorothy Dlubac
Supervisor, Record Room of
Registrar of Voters Office

Sworn to before me this 17th
day of September, 1976.

William N. Kleinman
Commissioner of the Superior Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOELLE FISHMAN, ET ALS	:	
Plaintiffs - Appellants	:	DOCKET NO. 76-7436
vs.	:	
GLORIA SCHAFFER, in her Official Capacity as Secretary of State of the State of Connecticut, ET AL	:	AFFIDAVIT IN SUPPORT OF THE BRIEF OF THE DEFENDANT-APPELLEE GLORIA SCHAFFER
Defendants - Appellees	:	

STATE OF CONNECTICUT)
) ss. Hartford SEPTEMBER 17, 1976
COUNTY OF HARTFORD)

I, HENRY S. COHN, being first duly sworn, depose and say:

1. I am the Elections Attorney and Director of the Elections Division of the Secretary of the State's Office. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of the brief of the defendant-appellee Gloria Schaffer.

2. As of this morning, September 17, 1976, approximately 11,685 certified signatures have been received in this office in support of petitions to place presidential electors representing Gus Hall and Jarvis Tyner on the ballot as presidential and vice-presidential candidates respectively.

3. On August 30, 1976, there were left in the office of the Secretary of the State at 4:31 p.m., sixty-one (61) nominating petition signature pages on behalf of the candidacies of Gus Hall and Jarvis Tyner. None of these signatures were certified according to the provisions of 9-453, Connecticut General Statutes (C.G.S.).

4. These sixty-one (61) pages submitted to this office contained a total of approximately ninety (90) signatures.

5. On September 15, 1976, this office submitted to the Director of Forms Management for the State of Connecticut a finalized list of the names of all candidates to appear on this state's presidential and overseas ballots. This list was delivered to the State printer on September 16, 1976. These ballots, once

printed, will be mailed to the clerks of all towns within the state as soon as possible thereafter.

6. With regard to this state's absentee ballots, the "camera ready copies" of these ballots are currently being mailed to all town clerks of this state. All eligible candidates and party names which do not currently appear on those copies must first be typed on the ballot by the various town clerks before they can be forwarded to the printer for finalization. The deadline, however, for forwarding these ballots by the Town Clerks to the printer is no later than September 22, 1976, as stated in my affidavit of September 9, 1976.

7. According to the official Connecticut State Register and Manual of 1969 prepared pursuant to Section 3-90, C.G.S., 77,674 absentee ballots were received by town clerks in the presidential election held on November 5, 1972. Of this number, 75,831 absentee ballots were counted. Total votes cast in that election were 1,274,526.

8. Review of the State Register and Manual of 1973 shows that 99,614 absentee ballots were received by town clerks in the presidential election held on November 7, 1972. Of that total, 97,341 absentee ballots were counted.

Total votes cast in that election were 1,409,221.

9. The Register and Manual of 1973 further shows that in that 1972 election, Ronald Sarasin (Republican) defeated John Monagan (Democrat) for United States Representative in the Fifth Congressional District by 5,436 votes. In that Congressional district, 17,711 absentee ballots were cast. Of that number, 17,352 were counted.

10. On an unofficial basis, it now appears clear that the U. S. Labor Party will qualify for the office of presidential electors for the current presidential election. As of this morning at 9:40 a.m., September 17, 1976, 13,413 certified signatures on behalf of the U. S. Labor Party have been received in this office. Further, phone contact with clerks throughout the state indicate that at least an additional 1,635 valid signatures have been submitted to them,resulting in a total of at least 15,048 valid signautres. It is noted that in order to

qualify for ballot position, 14,093 valid signatures are needed.

Henry S. Cohn
Elections Attorney,
Director of Elections Division
of the Secretary of State's Office

Sworn to before me this 17th
day of September, 1976.

William N. Kleinman
Commissioner of the Superior Court

CERTIFICATION OF SERVICE

I, DANIEL R. SCHAEFER, counsel for the Appellee, Gloria Schaffer, in her capacity as Secretary of the State of the State of Connecticut, hereby certify that on the 17th day of September, 1976, I served two (2) copies of the foregoing Brief by mailing the same in duly addressed envelopes, with postage prepaid, to Frank Cochran, Esq., 57 Pratt Street, Hartford, Connecticut 06103, and David Losee, Esq., 4 North Main Street, West Hartford, Connecticut.

Daniel R. Schaefer
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Telephone: Area 203 566-2203